International Brotherhood of Electrical Workers—Local 135 *and* La Crosse Electrical Contractors Association. Case 30-CB-2089

16 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 17 June 1983 La Crosse Electrical Contractors Association (the Employer Association) filed an unfair labor practice charge against International Brotherhood of Electrical Workers Local—135 (the Union). Complaint issued on the charge 12 July 1983. The complaint alleged that the Union had violated Section 8(b)(3) of the National Labor Relations Act by demanding, as a condition of entering into any collective-bargaining agreement with the Employer Association, that it agree to a provision requiring interest arbitration. The Union filed an answer 22 July 1983. Thereafter all parties to this proceeding entered into a stipulation of facts and of the record, waiving proceedings before an administrative law judge and requesting that the case be transferred to the Board for decision pursuant to Section 102.50 of the Board's Rules and Regulations. On 13 January 1984 the parties forwarded to the Board the stipulation, the stipulated record, and the briefs of the Union and the General Counsel.

The Board has delegated its authority in this proceeding to a three-member panel. We hereby approve the stipulation and order the proceeding transferred to the Board.

The Board has considered the stipulation and the stipulated record in light of the briefs and makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer Association is an organization composed of seven employers engaged as electrical contractors in the building and construction industry in the areas of western Wisconsin and eastern Minnesota. It represents its members in the negotiation and administration of collective-bargaining agreements. During calendar year 1982, the employer members of the Employer Association collectively purchased and received at their La Crosse, Wisconsin facilities goods valued in excess of $50,000 directly from points outside the State of Wisconsin. We find, as alleged in the complaint and admitted in the answer, that the Employer Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Stipulated Facts*

For at least 15 years, the Employer Association and the Union entered into and maintained a series of collective-bargaining agreements. Their most recent agreement was effective for the period 1 June 1982 through 1 June 1983. On 26 February 1983 the Employer Association sent a letter to the Union giving notice that it wanted to change or delete certain provisions of the collective-bargaining agreement upon its expiration. Among the provisions the Employer Association sought to delete were the following provisions for interest arbitration:

ARTICLE I

SECTION 1.02(D)—Unresolved issues in negotiation that remain on the 20th of the month preceding the next regular meeting of the Council on Industrial Relations may be submitted jointly or unilaterally by the parties to this Agreement to the Council for adjudication prior to the anniversary date of the Agreement.

(E) When a case has been submitted to the Council, it shall be the responsibility of the negotiating committee to continue to meet weekly in an effort to reach settlement on the local level prior to the meeting of the Council.

(F) Notice by either party of a desire to terminate this agreement shall be handled in the same manner as proposed change.

At negotiating meetings on 23 March and 11 April 1983, the parties were unable to reach agreement on several items including the foregoing provisions for interest arbitration. On 30 April 1983 the Employer Association and the Union jointly submitted the unresolved issues to the Council on Industrial Relations for the Electrical Contracting Industry. In its brief to the Council, the Employer Association requested that the interest arbitration provision be modified to require the consent of both parties before unresolved bargaining issues could be submitted to the Council for resolution. The Employer Association's brief further stated that this was not a negotiable item. The Union opposed the Employer Association's proposed change, asserting that labor unrest would result if the provision for mandatory interest arbitration were removed from its agreement with the Employer Association while the provision was re-

tained in its agreement with another multiemployer bargaining association.

On 16 May, the Council issued its decision declining "at this time to change the existing language or add new language" on interest arbitration.[1] The Employer Association and the Union have had no written collective-bargaining agreement since 1 June 1983.

B. *Discussion and Conclusions*

In its brief to the Board, the Union acknowledges that the parties bargained to impasse on interest arbitration, among other issues. The Board, with court approval, has repeatedly held that interest arbitration "is not a mandatory subject of bargaining and that neither party can compel the other to negotiate about a contract clause that would, in the event of a new contract negotiation disagreement, in effect substitute a third party as final decisionmaker of disputed contractual terms." *Plumbers Local 387 (Mechanical Contractors Assn.)*, 266 NLRB 129, 133 (1983), and cases there cited.[2] See also *Graphic Arts Local 23 v. Newspapers, Inc.*, 586 F.2d 19, 21 (7th Cir. 1978); *Sheet Metal Workers Local 14 v. Aldrich Air Conditioning*, 717 F.2d 456 (8th Cir. 1983). By insisting to impasse on such a nonmandatory provision the Union therefore violated its bargaining obligations under the Act. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349–350 (1958). That there were other issues dividing the parties is no defense, for "in order to reach an impasse in violation of [Section 8(b)(3)] it is not necessary that the [nonmandatory] proposal be the sole cause for failure of agreement." *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720, 728 (6th Cir. 1964), cert. denied 379 U.S. 888 (1964), enfg. in relevant part 140 NLRB 1103 (1963).

Nor is it a defense that the parties' contract provided for resolution of bargaining disputes through interest arbitration and that the parties submitted their dispute over interest arbitration to the Council on Industrial Relations pursuant to their contract. We rejected a similar contention in *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520, 521 (1976), invoking "the well-settled principle that, on[c]e having agreed to a nonmandatory term, a party does not thereafter impliedly waive the right to insist that the term be removed from the bargaining table in any subsequent negotiations." See *Chemical Workers Local 1 v. Pittsburgh Glass Co.*, 404 U.S. 157, 187 (1971). Accordingly, a prior agreement to submit disputes over new contract terms to interest arbitration does not bind the parties to accept an interest arbitrator's determination to perpetuate interest arbitration in future agreements. As we noted in *Sheet Metal Workers Local 59*, above at 521, "Because the nonmandatory subjects in issue here deal with contract dispute resolution, the very procedures in controversy could always be invoked to determine their continued force and effect, with the very real prospect of a perpetual existence for the nonmandatory contract term." See also *NLRB v. Printing Pressmen Local 252*, 543 F.2d 1161, 1169–1171 (5th Cir. 1976).

There is no merit to the Union's suggestion that by proceeding to interest arbitration under the collective-bargaining agreement the Employer Association waived its right to protest to the Board the Union's unlawful insistence on retaining interest arbitration in future agreements. Although the Board has elected to defer to contractual grievance and arbitration procedures and decisions thereunder, in certain circumstances, it has clearly rejected any suggestion that by resorting to such procedures the parties waive their right to bring unfair labor practice charges to the Board. See *United Technologies Corp.*, 268 NLRB 577 (1984); *Olin Corp.*, 268 NLRB 573 (1984). "By well established principle, private contracts may not be used to legitimate unfair labor practices nor to divest the Board of jurisdiction over such practices." *Emerson Electric Co. v. NLRB*, 650 F.2d 463, 467 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982), enfg. as modified 246 NLRB 1143 (1979). The Union has not contended that the Council's interest arbitration determination meets the Board's standards for deferral and it clearly does not. Issues presented in the interest arbitration proceeding, concerning what contractual terms shall bind the parties for the future, are in no sense parallel to the statutory issue presented here—whether the Union failed to bargain in good faith by insisting to impasse on a nonmandatory subject of bargaining. See *Printing Pressmen Local 252 (Page Corp.)*, 219 NLRB 268, 270 (1975), enfd. 543 F.2d 1161, 1167 (5th Cir. 1976). See also *Olin Corp.*, above.

At no time has the Employer Association acquiesced in the Union's demand for interest arbitration. As noted, the Employer Association bargained to impasse on the issue and argued in its brief to the Council that this was not a negotiable

[1] The Council's decision refers to the interest arbitration issue as "Modified CIR." The abbreviation "CIR" refers to the Council of Industrial Relations.

[2] As noted above it is undisputed in the present case that the clause insisted upon by the Union provided for interest arbitration. There is thus no occasion to reach the further issue addressed in *Plumbers Local 387*, 266 NLRB at 134–135, of whether a clause allegedly providing for a second level of bargaining by a new set of negotiators, rather than for interest arbitration by a third party, is also a nonmandatory subject of bargaining. Nor is there any dispute here that the parties bargained to impasse over the interest arbitration issue. See *Plumbers Local 387*, above at 134, distinguishing *Mechanical Contractors Assn. of Newburgh*, 202 NLRB 1, 3 (1973).

item. In sum, nothing in the parties' contract or in the conduct of the Employer Association legitimized the Union's unlawful insistence on a nonmandatory subject of bargaining. We therefore find merit in the complaint allegation that the Union violated Section 8(b)(3) of the Act by demanding, as a condition of entering into any collective-bargaining agreement, that the Employer Association agree to a provision requiring interest arbitration.

Cases cited by the Union are not to the contrary. Indeed, three of the four cited cases specifically recognize that interest arbitration is a nonmandatory subject of bargaining and that insistence to impasse on inclusion of an interest arbitration clause in a new contract is an unfair labor practice. *Sheet Metal Workers Local 14 v. Aldrich Air Conditioning*, 717 F.2d at 458; *NLRB v. Printing Pressmen Local 252*, above at 1164–1171; *Sheet Metal Workers Local 252 v. Standard Sheet Metal*, 699 F.2d 481, 483–484 (9th Cir. 1983). The fourth case does not involve interest arbitration. *Teamsters Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980), cert. denied 449 U.S. 1125 (1981).[3]

CONCLUSIONS OF LAW

By insisting to impasse that a new collective-bargaining agreement include a provision for interest arbitration, the Union has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(b)(3) of the Act by insisting, as a condition of any collective-bargaining agreement, that the Employer Association agree to interest arbitration, we shall order the Respondent to cease and desist from this, or any like or related, unfair labor practice. We shall also order the Respondent to post in conspicuous places at all its locations, including all places where notices to members are customarily posted, signed copies of the attached notice and to mail to the Regional Director for Region 30 sufficient signed copies of the notice for forwarding to the Employer Association and, if the Employer Association and its members are willing, for posting by them in all locations where notices to employees are customarily posted.

[3] There is no merit to the Union's effort to predicate a defense on the Employer Association's alleged failure to move to vacate the interest arbitration award. The stipulation of the parties is silent on whether the Employer Association moved to vacate the award. But, in any event, as noted, the arbitration award did not oust the Board of jurisdiction over the unfair labor practice issues in this case. Cf. *Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1963) ("The superior authority of the Board may be invoked at any time").

ORDER

The National Labor Relations Board orders that the Respondent, International Brotherhood of Electrical Workers—Local 135, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Insisting to impasse that La Crosse Electrical Contractors Association or any of its members agree to interest arbitration or any other nonmandatory subject of bargaining.

(b) In any like or related manner violating its obligation to bargain in good faith, under Section 8(b)(3) and Section 8(d) of the Act, with La Crosse Electrical Contractors Association or any of its members.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at all its locations copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Sign and mail sufficient copies of the notices to the Regional Director for forwarding to the La Crosse Electrical Contractors Association and for posting by the La Crosse Electrical Contractors Association and its members, if they are willing, in locations where notices to employees are customarily posted.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT insist to impasse that the La Crosse Electrical Contractors Association or any of its members agree to submit disputes over new contract terms to the Council on Industrial Relations or any other third party.

WE WILL NOT in any like or related manner violate our obligation under the Act to bargain in good faith with the La Crosse Electrical Contractors Association or any of its members.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS—LOCAL 135